(5)

No. 85-1116

Supreme Court, U.S.
FILED
JAN 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1985

THE CITY OF WHITTIER,
a Charter City, et al.,

Appellants,

v.

WALNUT PROPERTIES, INC.,
a California corporation,

Appellee.

On Appeal From The United States Court of Appeals For the Ninth Circuit

---

MOTION TO AFFIRM

STANLEY FLEISHMAN*
A Professional Corporation
2049 Century Park East
Suite 3160
Los Angeles, CA 90067
Telephone: (213) 551-2923

Of Counsel:

BARRY A. FISHER
Fisher & Moest
2049 Century Park East
Suite 3160
Los Angeles, CA 90067
Telephone: (213) 557-1077

**Counsel of Record*

No. 85-1116

In the Supreme Court of the
United States

October Term, 1985

THE CITY OF WHITTIER,
a Charter City, et al.,

Appellants,

v.

WALNUT PROPERTIES, INC.,
a California corporation,

Appellee.

On Appeal From The United States Court of Appeals
For the Ninth Circuit

MOTION TO AFFIRM

STANLEY FLEISHMAN*
A Professional Corporation
2049 Century Park East
Suite 3160
Los Angeles, CA 90067
Telephone: (213) 551-2923

Of Counsel:

BARRY A. FISHER
Fisher & Moest
2049 Century Park East
Suite 3160
Los Angeles, CA 90067
Telephone: (213) 557-1077

*Counsel of Record

TABLE OF CONTENTS

Page

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....ii

QUESTIONS PRESENTED.....iii

PARTIES TO THE PROCEEDING.....v

COUNTERSTATEMENT OF THE CASE.....1

REASONS FOR AFFIRMING THE JUDGMENT BELOW.....7

CONCLUSION.....11

TABLE OF AUTHORITIES

PAGE(S)

CASES

Alexander v. City of Minneapolis,
698 F.2d 936 (8th Cir. 1983).....8

Anderson v. City of Bessemer,
105 S.Ct. 1504 (1985).....7

Basiardanes v. City of Galveston,
682 F.2d 1203 (5th Cir. 1982).....8

Bernhard v. Bank of America,
19 Cal.2d 807, 122 P.2d 892 (1942).....9

Bleek v. State Board of Optometry,
18 Cal.App.3d 415 (1971).....9

Brockett v. Spokane Arcades, Inc.,
105 S.Ct. 2794 (1985).....11

J-R Distributors, Inc. v. Eikenberry,
725 F.2d 482 (9th Cir. 1984).....10,11

Migra v. Warren City School District
Board of Education,
104 S.Ct. 892 (1984).....8,9

Perez v. City of San Bruno,
25 Cal.3d 875, 168 Cal.Rptr. 114 (1980).....9

Schad v. Borough of Mount Ephraim,
452 U.S. 61 (1981).....8

Tovar v. Billmeyer,
721 F.2d 1260 (9th Cir. 1983).....6

QUESTIONS PRESENTED

1. Whether the district court's critical finding - that the provision of the City's adult business ordinance prohibiting an adult theater from operating within one thousand feet of a church makes it impossible to operate an adult theater in the City - is clearly erroneous.

2. Whether the court of appeals correctly affirmed the district court's judgment declaring the City's Ordinance violative of the First and Fourteenth Amendments to the United States Constitution because it makes it impossible to operate an adult theater in the City.

3. Whether the courts below correctly ruled that neither res judicata nor collateral estoppel applies to this case because:

A. There was no prior final judgment on whether the ordinance is constitutional as applied.

B. There was no prior decision on whether the ordinance had the effect of making it impossible to operate an adult theater in the City.

C. Under California law the state court proceeding is not preclusive.

4. Whether the district court abused its discretion when it exercised the jurisdiction conferred upon it by Congress, to determine whether the City acting under color of law denied appellee its federal constitutional rights.

PARTIES TO THE PROCEEDING

The jurisdictional statement accurately sets forth the parties to the proceedings. Initially Vincent Miranda, then President of Walnut Properties, Inc. was a plaintiff. He died after judgment was entered herein.

Walnut Properties, Inc. has no parent company nor does it have any subsidiaries or affiliates.

No. 85-1116

In the Supreme Court of the
United States

October Term, 1985

THE CITY OF WHITTIER,
a Charter City, et al.,

Appellants,

v.

WALNUT PROPERTIES, INC.,
a California corporation,

Appellee.

On Appeal From The United States Court of Appeals
For the Ninth Circuit

MOTION TO AFFIRM

Appellee Walnut Properties, Inc. moves that the final judgment herein be affirmed on the ground that the questions presented by appellants are not substantial, and are not properly before the Court.

COUNTERSTATEMENT OF THE CASE

On May 7, 1981 appellee Walnut Properties, Inc. (Walnut) filed a complaint in the United States

District Court, Central District of California against the City of Whittier, and its officials (City), for declaratory and injunctive relief. Walnut alleged that the City's "adult business" Ordinance, as applied to Walnut's motion picture theater, violated the First and Fourteenth Amendments to the United States Constitution because, inter alia, it had the purpose and effect of greatly restricting the exhibition of non-obscene "adult" motion picture films in the City.

The Ordinance in question - Ordinance No. 2257 - was enacted on March 24, 1981. It prohibited an adult theater from operating, inter alia, within one thousand feet of a church. After trial the district court filed its Findings of Fact and Conclusions of Law, finding that Walnut had the only theater in the City exhibiting adult films; that Ordinance No. 2257 applied to Walnut's theater solely because it is within one thousand feet of a church; and that the Ordinance's provision prohibiting an adult theater from operating within one thousand feet of a church "makes it impossible to operate an adult theater in the central business district of Whittier"

and "the Ordinance's effect would then be a total exclusion of adult theaters in Whittier." Appendix to Jurisdictional Statement, 40a.[1/] The district court entered judgment declaring invalid the portion of Ordinance No. 2257 which prohibits an adult theater from operating within one thousand feet of a church. The court also enjoined the City from initiating any proceedings against Walnut based upon the operation of the theater located at 7028 Greenleaf Avenue, Whittier, California, "solely because it is within one thousand feet of a church." App. 31a-32a[2/]

1/ Reference to the Appendix to the Jurisdictional Statement will be referred to as App. followed by the appropriate page.

2/ In its Findings of Fact and Conclusions of Law the district court also found Ordinance No. 2257 unconstitutional because it was improperly motivated (App. 39a-40a), and because the City had failed to meet the burden of proving that the required separation between a church and an adult theater furthered a compelling government interest unrelated to the suppression of free speech. (App. 38a-39a). The Ninth Circuit agreed. App. 6a, 8a, 12a.

The district court conducted a full evidentiary trial on November 15-16, 1983. Following final argument, the district court orally announced that it intended to find Ordinance No. 2257 unconstitutional insofar as it prohibited an adult theater from operating within one thousand feet of a church because the effect of this provision was to exclude all theaters from the City. At that time the only state court judgment in effect between the parties was the judgment of the superior court holding Ordinance No. 2138 unconstitutional.[3/]

After the district court announced its intended decision, but before it filed its Findings of Fact and Conclusions of Law, the California Court of Appeal rendered a judgment, in December 1983. App. 45a. The California Court of Appeal agreed with the superior court judge, that Ordinance No. 2138 was unconstitutional on its face, because the effect of

---

3/ On February 1, 1983 the California Court of Appeal did render a judgment (App. 67a) but it was nullified when the California Supreme Court granted a hearing on May 19, 1983. (App. 37a). See, Knouse v. Nimmocks, 8 Cal.2d 482, 483 (1937).

the Ordinance was to prohibit the operation of any adult business within the City. App. 49a-50a, n.3. Curiously, the California Court of Appeal then decided to consider the validity of Ordinance No. 2257 (App. 49a-50),[4/] the successor to Ordinance No. 2138, and concluded that the Ordinance was constitutional "if it leaves open alternate channels of communication . . . and does not violate the First Amendment." The court went on to state:

> No evidence having been introduced on the crucial issue of the availability of other areas in which a theater might be operated, the matter must be remanded for a hearing and determination of that issue.

App. 53a.

The California Court of Appeal ordered that on remand

> "the trial court shall make the necessary rulings on proffered evidence . . . as to the availability of

---

4/ The California Court of Appeal cites the ordinance as No. 2254. That was an emergency ordinance enacted when the superior court judge announced his intention to find Ordinance No. 2138 unconstitutional. No. 2254 became No. 2257, when it became a permanent ordinance.

> alternate sites in the City of Whittier, and enter judgment in accordance with this opinion and such additional findings."

App. 56a-57a.

The district court fully explained why the state court proceeding was no bar to the exercise of its jurisdiction, (App. 35a-38a)., and concluded:

> The judgment of the state court of appeal, reversing the judgment of the superior court, has not resulted in a judgment on the merits, and res judicata is not applicable to this case. No state tribunal has taken evidence on whether the City adequately justified the provisions of its ordinance prohibiting an adult theater from operating within one thousand feet of a church. Where, as here, plaintiffs preserve their rights to have Federal constitutional claims resolved in Federal court, the Federal court must exercise the jurisdiction entrusted to it by the constitution and laws of the United States. The state proceedings relied upon by the defendants herein do not justify stripping the court of its proper jurisdiction. See Tovar v. Billmeyer, 721 F.2d 1260, 1267 n.8 (9th Cir. 1983).

App. 41a.

The Ninth Circuit held that the district court, had properly exercised its jurisdiction, because under California law the California Court of Appeal judgment would not preclude the litigation which was conducted by the district court. App. 2a-2b, 4a. On the merits the Ninth Circuit found the Ordinance violative of the First and Fourteenth Amendments to the United States Constitution. App. 5a-9a.

REASONS FOR AFFIRMING THE JUDGMENT BELOW

1. The district court's critical finding, that the provision of the City's ordinance prohibiting an adult theater from operating within one thousand feet of a church has the effect of totally excluding adult theaters from the City, is entitled to great deference, and can only be overturned if it is "clearly erroneous." Anderson v. City of Bessemer, 105 S.Ct. 1504 (1985). This critical finding compels a conclusion that the Ordinance is unconstitutional. The Ninth Circuit so held, stating:

> If the Ordinance severely restricts the availability of

> a form of protected speech in Whittier, it violates the first amendment. See, Schad v. Borough of Mount Ephraim, 452 U.S. 61, 76 (1981); Alexander v. City of Minneapolis, 698 F.2d 936, 938-39 (8th Cir. 1983); Basiardanes v. City of Galveston, 682 F.2d 1203, 1213-14 (5th Cir. 1982). The district court found that the church provision "makes it impossible to operate an adult theater in the central business district of Whittier" and that "the ordinance's effect would then be a total exclusion of adult theaters in . . . Whittier."

App. 7a

2. It is common ground that Federal courts must accord a state court judgment the same preclusive effect the judgment would receive in the courts of that state. Migra v. Warren City School District Board of Education, 104 S.Ct. 892, 896-98 (1984).

The City concedes that under California law the district court was free to relitigate the issues remanded by the California Court of Appeal. Juris. Statement at 11-12. The California Court of Appeal remanded to the superior court the issue of alternative sites saying:

> No evidence having been introduced on the critical issue of the availability of other areas in which the theater might be operated, the matter must be remanded for a hearing and determination of that issue.

App. 53a.

The City's concession that the district court was free to litigate the issue remanded by the California Court of Appeal is in accord with California law. Bleek v. State Board of Optometry, 18 Cal.App.3d 415, 429 (1971). See also, Perez v. City of San Bruno, 25 Cal.3d 875, 885, 168 Cal.Rptr. 114, 117 (1980); Bernhard v. Bank of America, 19 Cal.2d 807, 810, 122 P.2d 892, 894 (1942).

Since California courts would not afford the judgment of the California Court of Appeal preclusive effect with regard to the question of whether the effect of the Ordinance herein would be the total exclusion of adult theaters from the City, the district court was free to litigate the issue. Migra, supra .

Finally, it should be noted that the City did not raise the res judicata issue when it filed its answer and counterclaim, nor did it raise

the issue in the pretrial order. The City first raised res judicata after the district court orally announced its intention to rule in Walnut's favor.

3. The City's argument that the district court should have abstained from exercising its jurisdiction (Juris. Statement 12-14) is meritless. Initially it should be noted that the City filed an answer and counterclaim alleging that Ordinance No. 2257 is constitutional, and asked the district court for a declaration to that effect. Additionally, the City did not raise abstention in the Ninth Circuit. In its Ninth Circuit brief, the City argued only that the decision of the California Court of Appeal is res judicata (Br. for Appellees 11-22) and that the City sustained its burden of proving that the Ordinance furthers substantial governmental interests (Id. at 22 -32).[5/] Because the City did not raise the abstention issue, the court of appeals did not discuss it. In any event, abstention is inappropriate in this case. See, J-R Distributors, Inc. v. Eikenberry, 725 F.2d 482, 487-88 (9th Cir.

5/ The Brief also challenged the fee award made to Walnut's counsel.

1984) reversed on other grounds. Brockett v. Spokane Arcades, Inc., 105 S.Ct. 2794 (1985). The district court has broad discretion on whether to exercise the jurisdiction conferred upon it by Congress, and the district court's decision will be reversed "only when there has been an abuse of discretion." J-R Distributors, Inc., supra, at 487. The district court did not abuse its discretion in this case.

CONCLUSION

For the aforesaid reasons the court should affirm the judgment below.

DATED: February 3, 1986

Respectfully submitted,

STANLEY FLEISHMAN
A Professional Corporation

By: _____
STANLEY FLEISHMAN
Attorney for Appellee
WALNUT PROPERTIES, INC.

Of Counsel:

BARRY A. FISHER
Fisher & Moest

0865A Sys./0052A Arch.

DECLARATION OF SERVICE BY MAIL

I, VICKI S. BUTLER, declare as follows:

I am a citizen of the United States and am employed in the County of Los Angeles. I am over the age of eighteen years and not a party to the within entitled action. My business address is 2049 Century Park East, Suite 3160, Los Angeles, California 90067.

On February 4, 1986, I served the within MOTION TO AFFIRM on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

J. Robert Flandrick, City Attorney
City of Whittier
624 S. Grand Avenue, 11th Floor
Los Angeles, California 90017

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct and that this declaration is executed this 4th day of February, 1986, at Los Angeles, California.

Vicki S. Butler

VICKI S. BUTLER